IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION EIGHT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALFONSO MARTINDALE, Defendant and Appellant.	**B213695** Superior Court No. LA056510

Appeal from the Superior Court of Los Angeles County

Honorable Susan Speer, Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

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ARGUMENT

Appellant Alfonso Martindale respectfully submits this reply brief in accordance with rule 8.200(a)(3) of the California Rules of Court. Any points from the respondent's brief not specifically addressed herein are adequately addressed in the appellant's opening brief.

I. The Evidence is Insufficient to Support Count 2 Because Mr. Martindale's Statements Did Not Constitute an Offense Under the Statute.

A. Respondent fails to explain how Mr. Martindale's statements could constitute a false bomb report as defined by the Legislature.

The appellant's opening brief argued that section 148.1[1] criminalizes only reports that a bomb "has been or would be placed or secreted," and that Mr. Martindale's intemperate but vague statements did not constitute a false bomb report within the definition of the statute. (AOB 10–12.) Respondent's counter-argument is that the jury *could have* found that the statements constituted a report that a bomb "has been or would be placed or secreted." (RB 11–13.) However, respondent fails to *explain* how the jury could have come to such a conclusion. Respondent fails to explain how Mr. Martindale's statements constituted a report that a bomb "has been or would be placed or secreted." Instead, respondent offers only conclusory statements that the jury could "rationally infer" a bomb threat. (RB 13.)

As argued in appellant's opening brief, it is clear that the Legislature did not intend for section 148.1 to punish vague statements about "blowing up" things or to serve as a quasi-

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[1/] Generic statutory references are to the Penal Code.

enhancement to section 422; the statute was meant to punish false bomb reports as commonly understood. (AOB 10–12.) Therefore, a reasonable jury could *not* infer that Mr. Martindale's statements constituted a false bomb report as defined in the statute.

B. Section 148.1 requires the intent to inform someone that a bomb has been or will be placed, not just the intent to speak.

Respondent also argues that section 148.1 does not require that a person *intend* his statements to communicate a false bomb report. (RB 13–16.) Under respondent's interpretation, a person who does *not* intend to communicate a false bomb report – someone who merely has the intent to speak – is criminally liable under section 148.1 if he or she makes statements *which can be interpreted as* a false bomb report. According to respondent, "the defendant need only do the act that constituted the crime [i.e., speaking] intentionally, not . . . intend his statements as a false bomb report." (RB 14.) Respondent is wrong for two reasons.

First, the law is clear: section 148.1 requires "that the person intend to communicate *that a bomb has been placed or secreted* knowing that it has not been." (*Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1020-1021, emphasis added; see also AOB 12–13.) Respondent claims that the *Levin* court only meant that the speaker must have the intent to speak, not the intent to

communicate any particular information or message. (RB 14.) But *Levin* plainly states that a person must intend to communicate that a bomb has been or will be placed; respondent's claim cannot survive the plain language of *Levin*.

Second, and more importantly, respondent's interpretation offends the First Amendment. Speech cannot be criminalized where the speaker has only the intent to speak but not the intent to communicate the prohibited words. Any law criminalizing speech must require that the speaker have the specific intent to communicate unprotected speech. (See, e.g., *McCoy v. Stewart* (9th Cir. 2002) 282 F.3d 626, 631–632; *State v. Krawsky* (Minn. 1988) 426 N.W.2d 875, 877 [statutes prohibiting speech are unconstitutionally overbroad without specific intent requirement]; *State v. Williams* (Conn. 1987), 534 A.2d 230, 238 [statute prohibiting verbally interfering with a police officer must be construed to require specific intent to interfere with police officer].) This Court is restrained from adopting respondent's interpretation of section 148.1.

Although *Levin* was wrong to categorize section 148.1 as a general intent crime, (see *Levin v. United Air Lines*, *supra*, 158 Cal.App.4th at p. 1021), it was correct in its description of the intent required: a speaker must intend to falsely communicate that

a bomb had been or will be placed. No substantial evidence shows that Mr. Martindale had such an intent, indeed the evidence shows the opposite. (AOB 13.) This Court must reverse.

II. The Court's Answer to the First Jury Question Was Prejudicial Error Because it Impermissibly Resolved a Question of Fact that Was a Prerequisite to a Guilty Verdict.

Even assuming *arguendo* that Mr. Martindale's statements could constitute a false bomb report, it was the role of the jury to make the factual determination of *whether* they constituted a false bomb report. Unfortunately, the trial court's answer to the first jury question made this factual determination for the jury. The court instructed the jury that yes, Mr. Martindale's phrase "blow up" constituted a report of a "bomb or explosive device." The court's instruction impermissibly removed an element of the offense from the jury, and the constitutional error was prejudicial. Respondent's claims to the contrary are not persuasive.

A. The court's instruction did not inform the jury on a point of law; it impermissibly resolved a question of fact.

Respondent claims the trial court was within its discretion to give the supplemental instruction, pointing to section 1138 as authority for the court to give it. (RB 20–21.) However, section 1138 only permits the court to further instruct the jury on

principles of law. (See § 1138 [court must provide jury with information on "any point of law arising in the case"]; *People v. Smithey* (1999) 20 Cal.4th 936, 985 ["Section 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law"].) The statute does not permit a court to *resolve* an issue of law or fact, because doing so impermissibly removes the issue from the jury and directs a finding on it. (E.g., *People v. Figueroa* (1986) 41 Cal.3d 714, 734; see also *People v. Flood* (1998) 18 Cal.4th 470, 491.) But that is exactly what the trial court did in this case. The jury's first question posed a factual question: "Does 'blow up' qualify as a bomb or explosive device[?]" (CT 68.) As explained in the appellant's opening brief, the court's answer – "Yes" – impermissibly *resolved* the factual question, relieving the prosecution of its burden of proof on that issue. (See AOB 17–19.) The court's instruction was not a simple explanation of the law, as would be allowed by section 1138; it was an unconstitutional resolution of a dispositive issue before the jury.

Respondent also claims that the court's answer was unobjectionable because it is similar to the supplemental instruction upheld in *People v. Yarborough* (2008) 169 Cal.App.4th 303. (RB 21–22.) Respondent is mistaken. The supplemental instruction in *Yarborough* was upheld because the Court of Appeal

found that it merely *clarified* points of law. (*Id.* at pp. 315–316.) The instruction in *Yarborough* was permissible because it did not resolve an issue of law or fact:

> the instruction left the jury with the task of making two essential factual determinations based upon the evidence as a prerequisite to a guilty verdict . . . . The instruction given by the trial court in response to the jury's inquiry did not remove any issue of fact from the jury or direct a verdict for the prosecution.

(*Id.* at p. 316.) The Court of Appeal made pains to note that the instruction *would* have violated due process if it had instructed the jury that a fact – even an undisputed fact – had been established. (*Id.* at p. 315; see also *People v. Figueroa*, *supra*, 41 Cal.3d at pp. 730–734.)

But that is what happened here: the court instructed the jury that a fact had been established. The question of whether Mr. Martindale's statements – including a threat to "blow up" the parking lot – constituted a report that a "bomb or other explosive has been or will be placed or secreted" was a factual determination. It was element 2 of the offense (see CT 91), and thus was a prerequisite to a guilty verdict on Count 2. (See AOB 17–19.) The court's instruction made this factual determination: it instructed the jury that yes, "blow up" qualified as a "bomb or explosive device." It thus impermissibly took element 2 out of the province of

the jury and lessened the prosecution's burden of proof.

The court's fatal error was to begin the supplemental instruction with the word "Yes." The jury asked a simple yes-or-no question of fact ("Does 'blow up' qualify as a bomb or explosive device"), the answer to which would resolve element 2 of the crime. The court answered definitively with its very first word: "Yes." Any *further* explanation or qualification in the supplemental instruction does not change the fact that the jury's question had already been clearly resolved. Respondent argues that the instruction left *other* factual determinations for the jury, (RB 22), but this is immaterial. Whether Mr. Martindale informed Joann Liddell "[t]hat a bomb or other explosive device has been or will be placed or secreted in any public or private place" was an element of the crime. (CT 90; see § 148.1) The court's supplemental instruction resolved this element. The fact that the instruction also explained the law does not ameliorate the constitutional damage.[2] The instruction was constitutional error.

[2/] Imagine if the jury had asked, "Is Mr. Martindale guilty?" and the court had answered, "Yes, if you find his words constituted a false bomb report, you must find him guilty." A reasonable juror would understand the answer to mean yes, Mr. Martindale was guilty.

B. Prejudice is clear because the jury's question about element 2 shows that it was uncertain about element 2.

Respondent claims that the court's improper determination of a factual issue did not prejudice Mr. Martindale because the jury would have found him guilty anyway. (RB 23–25.) This claim cannot survive scrutiny. Respondent ignores the incontrovertible evidence that the jury *was not sure* if Mr. Martindale's statements constituted a false bomb report – *it sent a note to the judge asking that very question*. (CT 68.) It is absurd to argue that the jury surely would have decided that Mr. Martindale's statements were a report of a "bomb or explosive device" when the jury was unsure enough to send the same question to the judge. The jury's question clearly showed that it was confused on the issue. (E.g., *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [jury's question about issue suggested that issue was "critical" for jury].) The jury's subsequent question showed that it had accepted the court's answer of "Yes." (See AOB 21–22.) Therefore, this Court cannot say beyond a reasonable doubt that the jury would have come to the same conclusion that the judge dictated to them. (See *People v. Beltran* (1989) 210 Cal.App.3d 1295, 1308 [when instruction partially invades province of the jury as to an element, standard of prejudice is harmless-beyond-a-reasonable-doubt under *Chapman*

v. California].)

The jury could have easily determined that Mr. Martindale's reference to "blowing up" the parking lot was *not* a literal reference to a bomb – not a report that a bomb had been or would be placed. Modern colloquial English often uses metaphors of destruction in a non-literal manner: "electrify the crowd," "set this place on fire," "blow this place up," "rock this place," et cetera. Mr. Martindale was clearly upset about being denied for a loan, and his words were a vent for his feelings – *not* a report that he had placed or would place a bomb in the building. In any case, Mr. Martindale was entitled to have a jury determine whether his reference to "blowing up" constituted a literal bomb report. Because there is a reasonable doubt that the jury could have, Mr. Martindale was prejudiced by the court's instruction.

C. Trial counsel committed ineffective assistance because there could be no reasonable tactical explanation for counsel's acquiescence in a jury instruction that removed a contested element from the jury.

Respondent claims that because the record "does not disclose whether counsel had a tactical reason" for acquiescing in the erroneous instruction, a claim of ineffective assistance must fail. (RB 26.) Respondent also claims that counsel could have had a reasonable tactical basis for acquiescing. (RB 26–27.) Both claims

are mistaken.

First, a claim of ineffective assistance of counsel is not insulated from review simply because the record does not conclusively show the presence or absence of counsel's tactical justification. Mr. Martindale's claim is that counsel's action was so unreasonable, it *could not have* had a reasonable tactical justification. (See AOB 22–23.) If there "simply could be no satisfactory explanation" – no satisfactory tactical reason – then counsel's action constituted ineffective assistance. (*People v. Pope* (1979) 23 Cal.3d 412, 426; *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, fn. 3; *Strickland v. Washington* (1984) 466 U.S. 668, 689 [104 S.Ct. 2052; 80 L.Ed.2d 674] [if counsel's tactical decision does not fall within the range of tactics that "might be considered sound trial strategy," then it constitutes ineffective assistance].) This Court can consider claims of ineffective assistance even when trial counsel does not announce every tactical justification (or lack thereof) for the record.

Second, the record conclusively shows that there could *not* have been a reasonable tactical justification for counsel's acquiescing in a jury instruction that removed a contested element from the jury. For the reasons argued *infra* and in the opening brief, the court's supplemental instruction impermissibly

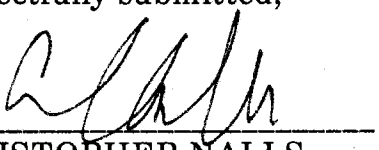
determined an issue of fact and removed element 2 from the province of the jury. No reasonable attorney would allow such a blatant and prejudicial constitutional violation to occur. Respondent suggests that because the supplemental instruction was incorrect in *additional* respects, counsel may have had a reasonable tactical justification for failing to object. (RT 26–27.) But nothing else in the instruction could make up for directing a verdict on element 2 – the most contested element of the offense. Because the instruction was unconstitutional and prejudicial, this Court must reverse.

CONCLUSION

The evidence was insufficient to support a conviction for Count 2; the conviction must be reversed. In the alternative, Count 2 must be reversed because the court committed prejudicial instructional error.

Dated: December 18, 2009

Respectfully submitted,



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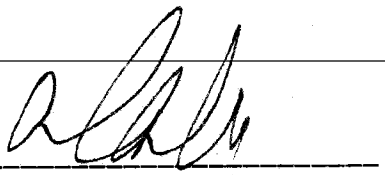
CERTIFICATION OF WORD COUNT

I certify that the Appellant's Reply Brief contains 2,409 words, as calculated in accordance with rule 8.204(c) of the California Rules of Court. Executed at Pasadena, California, on December 18, 2009.



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